

SECRETARIAT

FEDERAL ELECTION COMMISSION

**999 E Street, N.W.
Washington, D.C. 20463**

2004 JUL 23 A 9:01

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5467

DATE COMPLAINT FILED: June 24, 2004

DATE OF NOTIFICATION: June 30, 2004

DATE ACTIVATED: July 7, 2004

EXPIRATION OF SOL: July 31, 2009

COMPLAINANT:

Citizens United

RESPONDENTS:

Michael Moore

Lions Gate Entertainment Corporation

Lions Gate Films Inc.

Cablevision Systems Corporation

Rainbow Media Holdings LLC

The Independent Film Channel LLC

Fellowship Adventure Group LLC

Harvey Weinstein

Bob Weinstein

Showtime Network, Inc.

Viacom International Inc.

RELEVANT STATUTES:

2 U.S.C. § 437g(a)

11 C.F.R. § 111.4(a)

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that corporate distributors of the film FAHRENHEIT 9/11 are now running broadcast advertisements that contain images of President Bush and other federal candidates, which would violate the Act's electioneering communications provisions if aired after July 30, 2004. Because the relevant Respondents flatly deny that they intend to run such

1 advertisements during the electioneering communications period, and because the facts alleged
2 by Complainants permit no inference that violations of the Act are about to occur, we
3 recommend the Commission dismiss the complaint.

4 **II. FACTUAL SUMMARY**

5 FAHRENHEIT 9/11, a film written, directed, and produced by Michael Moore, was released
6 on June 25, 2004. The controversial film examines the Bush administration's domestic and
7 international policies since the 2001 terrorist attacks and is highly critical of the Bush presidency.
8 Advertisements for the film, featuring images and sound clips of President Bush, began airing on
9 June 13, 2004. *See Compl. at 7.*

10 The complaint alleges future violations of the Act. Specifically, the complaint asserts that
11 advertisements for FAHRENHEIT 9/11 will constitute electioneering communications subject to the
12 Act's source restrictions and reporting requirements if they are broadcast after July 30, 2004.
13 According to the complaint, corporate funding of advertisements during the electioneering
14 communications period will violate 2 U.S.C. § 441b(b)(2), and any disbursements by Lions Gate
15 Entertainment Corporation during that time will violate the prohibition on direct or indirect
16 funding of electioneering communications by foreign nationals. *See 2 U.S.C. § 441e(a)(1)(C).*
17 Respondents in this matter include various individuals and companies allegedly involved in the
18 marketing and distribution of FAHRENHEIT 9/11. *See Compl. at 3-5.*

1 In a jointly filed response, several Respondents identified in the complaint as the
2 individuals and entities funding advertisements for the film contend that this matter should be
3 dismissed.² First, these Respondents state that the complaint improperly names various
4 Respondents by misidentifying the entities involved in marketing and distributing FAHRENHEIT
5 9/11. In particular, the joint response notes the following:

- 6 ■ Fellowship Adventure Group LLC ("Fellowship"), a Delaware limited liability company
7 formed by Harvey Weinstein and Bob Weinstein, holds the worldwide distribution rights
8 to FAHRENHEIT 9/11. Because Fellowship has elected federal partnership tax status and is
9 composed of individuals, it is not properly treated as a corporation under the Act and
10 Commission regulations. *See* Joint Resp. at 4 (*citing* 11 C.F.R. § 110.1(e), (g)).
- 11 ■ The Independent Film Channel LLC and its direct and indirect parents, Rainbow Media
12 Holdings LLC and Cablevision Systems Corporation, entities named as Respondents,
13 have not undertaken any activities with respect to the distribution of FAHRENHEIT 9/11.
14 IFC Films LLC ("IFC Films"), a Delaware limited liability company and a sister entity to
15 The Independent Film Channel LLC, is involved in theatrical distribution of the film but
16 is not named in the complaint. *See id.* at 4-5.
- 17 ■ Lions Gate Entertainment Corporation, a Canadian corporation named as a Respondent,
18 has no connection to the distribution and advertising of FAHRENHEIT 9/11. Lions Gate
19 Films Inc. ("Lions Gate Films"), a domestic corporation and indirect subsidiary of Lions
20 Gate Entertainment Corporation, is the only Lions Gate entity involved in the distribution
21 and advertising of the film. *See id.* at 5.

22 In sum, Respondents state that only Fellowship Adventure Group LLC, IFC Films LLC, and
23 Lions Gate Films Inc. (collectively, "Distributors") control domestic advertising and marketing
24 for the film's theatrical release and bear responsibility for the content of any paid advertising, and
25 that the complaint should be dismissed as to all other Respondents. *See id.* at 5.

26 More importantly, Respondents deny that a violation of the Act is imminent. The joint
27 response asserts:

² These Respondents include Lions Gate Entertainment Corporation, Cablevision Systems Corporation, Rainbow Media Holdings LLC, The Independent Film Channel LLC, Fellowship Adventure Group LLC, Harvey Weinstein, and Bob Weinstein.

1 [S]ubstantially prior to the filing of the Complaint, the distributors
2 of the Film... had made a business determination as part of the
3 marketing plan for the film and with a view to the legal landscape
4 that, among other things, no funds would be expended for paid
5 advertisements over broadcast, cable, or satellite that would refer
6 to clearly identified candidates for federal office during the period
7 after July 30, 2004 and through November 2, 2004.

8 *See id.* at 2. Respondents explain that current advertisements for FAHRENHEIT 9/11 focus on
9 audience and critical reaction to the film rather than contain scenes from the movie, and that the
10 evolution of its advertising campaign is "fully consistent" with customary marketing practices in
11 the film industry. *See id.* at 7. According to these Respondents, advertisements aired within 30
12 days before the Republican National Convention or 60 days before the general election will not
13 identify a federal candidate and, therefore, will not qualify as electioneering communications.

14 Viacom International Inc. ("Viacom") and its subsidiary, Showtime Networks Inc.
15 ("SNI"), similarly deny that they are "about to violate" the Act. The response states that Viacom
16 has no contractual rights to disseminate, market, or advertise FAHRENHEIT 9/11, and was named
17 in the complaint solely based on its corporate relationship with SNI. *See Viacom Resp.* at 2-3.
18 In addition, the response asserts that, while SNI does hold the exclusive right to exhibit and
19 advertise FAHRENHEIT 9/11 on its premium subscription television networks, it may not do so
20 until 2005.³ *See id.* at 2, 5. Indeed, the response maintains that SNI is contractually barred from

³ According to the response, SNI holds the right to exhibit films distributed by Lions Gate Films pursuant to a 1997 output agreement with the predecessor-in-interest of Lions Gate Films. The agreement permits SNI to exhibit films on its premium subscription television networks ("The Showtime Networks") the earlier of 12 months after its United States theatrical release or six months after it becomes available on home video, pay-per-view, or video-on-demand. SNI may not advertise, promote or publicize any film to the general public prior to 60 days before the film may be shown on the Showtime Networks. Relevant to the instant matter, SNI may not exhibit FAHRENHEIT 9/11 on the Showtime Networks until the earlier of June 23, 2005 or six months after the film's planned Fall 2004 DVD release date. *See Viacom Resp.* at 2, 5.

1 advertising FAHRENHEIT 9/11 until well after the Republican National Convention and the
2 general election. *See id.*

3 Michael Moore filed a late response to the complaint asserting that he has not made
4 expenditures for FAHRENHEIT 9/11 advertisements and will not do so in the future. *See Moore*
5 *Resp.* at 2.

6 **III. LEGAL ANALYSIS**

7 Section 437g(a)(2) grants the Commission authority to take enforcement action where
8 there is reason to believe that a person has committed, or is about to commit, a violation of the
9 Act. *See also* 11 C.F.R. § 111.4(a). The Commission cannot entertain complaints based on mere
10 speculation that a person may violate the law at some future date. *See* Statement of Reasons in
11 MUR 4960 (Hillary Rodham Clinton for Senate) at 3 ("Purely speculative charges, especially
12 when accompanied by a direct refutation, do not form an adequate basis to find reason to believe
13 that a violation of the FECA has occurred.").

14 Here, Respondents have not violated the Act because the relevant electioneering
15 communications period does not begin until July 31, 2004. The complaint cites no information
16 from which a fair inference can be drawn that Respondents plan to broadcast advertisements that
17 qualify as electioneering communications within 30 days before the Republican National
18 Convention. Moreover, Respondents have unequivocally stated that the entities responsible for
19 marketing and distributing the film have made a "business determination" *not* to expend funds
20 for paid advertisements over broadcast, cable, or satellite that would refer to a clearly identified

1 federal candidate during the electioneering communications period. *See* Joint Resp. at 2, 7. This
2 Office has no information to support a conclusion that Respondents intend to do otherwise.⁴

3 Indeed, the contention upon which the complainant principally relies, *i.e.*, that the
4 Respondents are about to violate the Act simply because they are running advertisements now, is
5 logically flawed on its face. The Act and its implementing regulations do not prohibit
6 corporations from financing electioneering communications during periods outside the 30- and
7 60-day timeframes. Assuming *arguendo* that the alleged advertisements would meet the
8 prerequisites for an electioneering communication if aired within 30 days before the Republican
9 convention or 60 days before the general election, it does not logically follow that simply because
10 a corporation finances communications when it is lawful to do so, the corporation will finance
11 such communications when it is unlawful to do so. As a result, the Commission could have
12 dismissed this matter under 2 U.S.C. § 437g(a)(1) even before receiving the responses submitted
13 by Respondents.⁵

14 Thus, the instant complaint presents nothing more than idle, unsupported speculation.
15 The Commission should not entertain a complaint that offers no more than the simple fact of
16 legal conduct prior to the cutoff date as support for an allegation that illegal conduct will occur
17 after the cutoff date. Nor should the Commission keep this matter open to ascertain whether
18 Respondents will act in a manner contrary to their firm representations. To do either would

⁴ Further, certain Respondents apparently will play no role in promoting and marketing the film. *See* Joint Resp. at 4-5.

⁵ Some Commissioners have opined that a complaint must allege that a violation has actually occurred for the Commission to have jurisdiction over the matter pursuant to 2 U.S.C. § 437g(a)(1). *See* Statements of Reasons of Commissioners Toner and Vice Chairman Smith in MUR 5338 (The Leadership Forum). The Commission need not reach this issue because the complaint here provides no facts supporting a reasonable inference that a violation either has occurred or is about to occur.

1 invite misuse of the enforcement process to harass political opponents engaged in legal conduct
2 and would leave an unwarranted cloud over Respondents' activities. Under these circumstances,
3 this Office does not believe the Respondents should be required to bear the burden and expense
4 of defending themselves further or that the Commission should address on the merits the
5 applicability of the electioneering communication requirements to the alleged advertisements.⁶

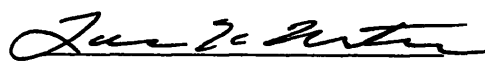
6 Accordingly, this Office recommends that the Commission dismiss this matter as to all
7 Respondents.

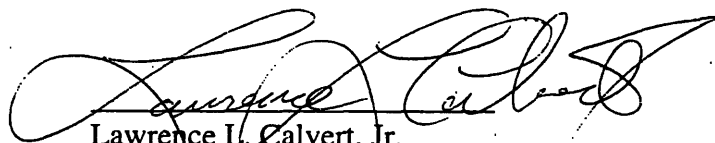
⁶ The underlying issue as to the applicability of the media exemption to the electioneering communications rules would be better addressed in connection with a fuller picture of the potentially relevant facts, and an opportunity to address the merits of this issue is likely to present itself in the near future.


IV. RECOMMENDATIONS

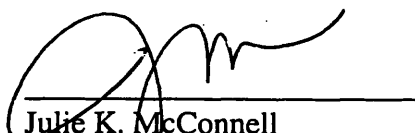
1. Dismiss this matter as to Michael Moore, Lions Gate Entertainment Corporation, Lions Gate Films Inc., Cablevision Systems Corporation, Rainbow Media Holdings LLC, The Independent Film Channel LLC, Fellowship Adventure Group LLC, Harvey Weinstein, Bob Weinstein, Showtime Network, Inc., and Viacom International Inc.
2. Approve the appropriate letters.

7/22/07
Date


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